

Submitted by Counsel:

*Ulysses D. Ware*

Ulysses Thomas Ware

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

\_\_\_\_\_  
ULYSSES THOMAS WARE,  
PETITIONER,

VS.

\_\_\_\_\_  
WARDEN DARLEEN DREW,  
BUREAU OF PRISONS,  
ATLANTA PRISON CAMP.  
RESPONDENTS.

CASE #: 12-CV-\_\_\_\_\_

**1: 12-CV-4397**

EMERGENCY PETITION FOR IMMEDIATE RELEASE  
28 USC §2241: PETITION FOR A WRIT OF HABEAS CORPUS  
ACTUAL AND FACTUAL INNOCENCE OF ALL CHARGES

Appendix III to 12/12/2012 Declaration of Material Fact

**11**

12/13/2012





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Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

05 CR 1115 (WHP)

5 ULYSSES THOMAS WARE, aka  
6 "Thomas Ware",

Defendant.

7 -----x

8 New York, N.Y.  
9 January 5, 2007  
10 12:15 p.m.

11 Before:

12 HON. WILLIAM H. PAULEY III,

13 District Judge

14 APPEARANCES

15 MICHAEL J. GARCIA

16 United States Attorney for the  
Southern District of New York

17 ALEXANDER H. SOUTHWELL

STEVEN D. FELDMAN

18 Assistant United States Attorney

19 ULYSSES THOMAS WARE, Pro Se

20 GARY BECKER

CJA Standby Attorney for Defendant Ware

21 SPECIAL AGENT DAVID MAKOL, FBI

1 (In open court)

2 THE DEPUTY CLERK: Matter on for hearing, United  
3 States of America against Ulysses Thomas Ware. Would counsel  
4 for the government please state his appearance for the record.

5 MR. SOUTHWELL: Alexander Southwell for the  
6 government. With me is Special Agent David Makol for the FBI.  
7 AUSA Feldman is stuck in magistrate court and may be joining us  
8 in a minute.

9 THE COURT: Good afternoon, Mr. Southwell.

10 MR. WARE: Mr. Ware.

11 THE COURT: Good afternoon, Mr. Ware.

12 MR. BECKER: Gary Becker, standby counsel for  
13 Mr. Ware. Good afternoon, your Honor.

14 THE COURT: Good afternoon, Mr. Becker.

15 I've had an opportunity to review Mr. Ware's motion  
16 papers. I've also received and reviewed the government's  
17 response, and I have reviewed a reply paper submitted by  
18 Mr. Ware. At this time, the Court is prepared to hear from the  
19 parties concerning this matter.

20 Mr. Ware, do you wish to be heard?

21 MR. WARE: Yes, sir your Honor. Should I step to the  
22 podium?

23 THE COURT: That might be best. That way we'll all be  
24 able to clearly hear you.

25 MR. WARE: Your Honor, I'll make a brief opening

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1 statement, and I'll get right into the meat of the matter, if  
2 you don't mind. Is that permissible?

3 THE COURT: Go ahead. Yes.

4 MR. WARE: Yes, sir, your Honor. I filed this motion  
5 to suppress in response to the current case brought by the  
6 government. The current case originated from a civil  
7 proceeding in the District of Nevada filed on or about July 14,  
8 2003 by Jeffrey Norris, who at that time was the lead counsel  
9 at that time for the SEC.

10 In the course of that proceeding, there was some  
11 contact by the SEC by detective -- excuse me, Special Agent  
12 David Makol of the FBI. Pursuant to that contact, Mr. Norris,  
13 according to the affidavit of October 3, 2005, said that he  
14 freely shared public information initially and subsequently  
15 nonpublic information with the FBI.

16 A short time after that a request, actually on  
17 August 17, 2004, Alexander Southwell, the district United  
18 States attorney in the Southern District of New York, faxed to  
19 Jeffrey Norris an access to files requesting access to all  
20 public and nonpublic information contained in Mr. Norris's SEC  
21 administrative and civil file. According to Mr. Norris's  
22 affidavit he readily provided the SEC, FBI and U.S. Attorney's  
23 office with all the information that he had in his file.

24 I think, your Honor, one of the primary issues in this  
25 particular matter is at what point did Special Agent Makol of

1 the FBI actually contact Mr. Norris. Again, the government has  
2 not actually supplied the date for that in any of its papers.  
3 And that's very important for two reasons. According to the  
4 authority that I've cited in my moving papers is that once a  
5 civil action is initiated and a subsequent criminal action is  
6 initiated for the same conduct -- this is at least my position  
7 -- is that the government must notify the defendant in the  
8 civil and the criminal action of its initiation or pending  
9 criminal charges. And I can state for the record, your Honor,  
10 that was never done.

11 THE COURT: Didn't the civil proceedings in Nevada  
12 begin long before July 14, 2003?

13 MR. WARE: Your Honor, that was the civil  
14 investigative portion of that. It started approximately April  
15 of 2002, the investigative portion of that action. It  
16 subsequently went towards a civil action actually being filed  
17 in U.S. District Court at the conclusion of the investigative  
18 portion of that.

19 THE COURT: Didn't you and others give depositions in  
20 June and July of 2002?

21 MR. WARE: Yes, depositions were given to the SEC in  
22 June of about 2002, correct.

23 THE COURT: According to the government, the criminal  
24 investigation here in the Southern District commenced with a  
25 referral to their office; that is, the U.S. Attorney's office

1 for the Southern District, in December of 2003. Isn't that  
2 true?

3 MR. WARE: Well, according to the government's papers,  
4 at least what my understanding of what the government said, a  
5 referral came in from Judge Sand's office to their office on or  
6 about December '03, correct.

7 THE COURT: So what is the factual basis for your  
8 assertion that the United States Attorney's office for the  
9 Southern District of New York was using the SEC civil  
10 investigation in 2002 in contemplation of a criminal proceeding  
11 in this district?

12 MR. WARE: Well, your Honor, I think we have to  
13 bifurcate the actions of the SEC in two distinct phases.  
14 Number one, you had civil investigative phase which started on  
15 or about April 2002 and ended on or about December 2003 with  
16 the Wells notice. That was basically the official last chance  
17 to make a determination whether or not this is going forward or  
18 whether or not it will be terminated.

19 From that point on, which, again, is about the same  
20 time as the referral came into the United States Attorney's  
21 office on or about December 2003. On or about July 2003,  
22 that's when the civil action after it was made from the civil  
23 investigation, additional -- an enforcement proceeding will be  
24 initiated evidenced by the filing of a civil complaint in the  
25 District of Nevada by Jeffrey Norris.



1 THE COURT: That civil enforcement action in the  
2 District of Nevada was filed before the referral from Judge  
3 Sand in this district. Correct?

4 MR. WARE: Yes, sir. From that point, the Federal  
5 Rules of Civil Procedure attached to the case, which means  
6 that -- of course you know what the Federal Rules of Civil  
7 Procedure that govern discovery, production of documents, etc.  
8 So from that point on, all depositions, discovery, etc., was  
9 governed by the Federal Rules of Civil Procedure.

10 Now, once Mr. Southwell became involved in the case --  
11 the official referral came into his office, according to the  
12 government's papers, December of 03. Agent Makol contacted  
13 Mr. Norris sometime after the filing of the civil complaint in  
14 July of 2003. Now, exactly what date that is, that's a  
15 disputed issue. The government has never said what date Agent  
16 Makol actually contacted Mr. Norris. So from that date  
17 forward, the contact by Mr. Norris, by FBI Agent Makol, at that  
18 point, my moving papers assert that the government had an  
19 obligation and responsibility to not only notify the defendants  
20 in that civil litigation but also the Court, because, again,  
21 the Federal Rules of Civil Procedure give defendants in same  
22 conduct actions certain rights to seek protective orders,  
23 number one, under the Federal Rules of Civil Procedure 26(c).  
24 Now, it's virtually impossible to seek a protective order if  
25 you don't know you need protection from something or it's

1 virtually impossible to take the Fifth Amendment to remain  
2 silent unless you know there is something you need to take the  
3 Fifth Amendment to remain silent of.

4 So, I assert and my papers assert that from that  
5 moment when FBI Agent Makol contacted Jeffrey Norris,  
6 Mr. Norris was aware at that point there was a contemplated  
7 criminal action against myself and some of the civil litigants  
8 in that case, and Mr. Norris was obligated at that point to  
9 notify not only the civil litigants but also the Court so that  
10 the rights of the civil litigants could be protected.

11 THE COURT: All right. Accepting -- that is,  
12 accepting your argument as true for the moment, what was it  
13 that was produced after July of 2003 that you're seeking to  
14 suppress?

15 MR. WARE: Okay, your Honor, pursuant to Mr. Norris's  
16 subpoenas, notices to produce, other procedures under the  
17 Federal Rules of Civil Procedure, a lot of documents. Exactly  
18 what, I don't know exactly what. Also, I made a request on  
19 Mr. Southwell to provide a log of all documents that were  
20 produced by the SEC. Of course, he refused to do that.

21 THE COURT: Just hold on for one second. You say that  
22 you don't know what material it is that you're seeking to  
23 suppress?

24 MR. WARE: Well, your Honor --

25 THE COURT: Let's see if we can draw some lines so

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1 that I can understand whether you agree with me that there is  
2 certain material that is not the subject of any motion to  
3 suppress by you in this case.

4 MR. WARE: Sure.

5 THE COURT: Are you seeking to suppress your  
6 deposition?

7 MR. WARE: No, sir, your Honor. I think Mr. Southwell  
8 has indicated he will not use that. I will seek to suppress  
9 all information --

10 THE COURT: But even if he weren't going to use it,  
11 would you agree that that material would not be subject to  
12 suppression based on the argument advanced in your motion?

13 MR. WARE: Your Honor, I would like to cite one case  
14 that Mr. Southwell also cited in his case, the case of U.S. v.  
15 Fields, which is a Second Circuit case.

16 THE COURT: Just hold on one second.

17 Mr. Feldman, you're in the case. You can come up and  
18 sit in the well.

19 MR. FELDMAN: Thank you, your Honor.

20 MR. BECKER: Your Honor, may I confer with Mr. Ware  
21 for one moment?

22 THE COURT: Surely.

23 MR. BECKER: Thank you, your Honor.

24 (Pause)

25 MR. WARE: Your Honor, the case I was referring to,

1 the case of *U.S. v. Fields*, 592 F.2d 638 (2d Cir. 1978) case  
2 that Mr. Southwell had cited in his opposition to the motion to  
3 suppress, and that is, again, a Second Circuit case where in  
4 that case there was basically almost a similar fact pattern.  
5 There was initial SEC investigation and an SEC civil action was  
6 filed. There was a settlement concluded in the civil action, a  
7 subsequent referral to the U.S. Justice Department and a  
8 subsequent indictment.

9 Now, in that particular case, the SEC -- there they  
10 were very careful to follow the procedures when they were aware  
11 that once the civil action attached, the Federal Rules of Civil  
12 Procedure attach. None of the file was transferred to the  
13 criminal authorities until the conclusion of the entire SEC  
14 action, meaning the investigative phase which was over once the  
15 civil action was filed, but none of the file was sent over to  
16 criminal authorities, none of it, investigative or civil action  
17 file until the conclusion, a settlement was reached in the  
18 civil action.

19 That's what I'm saying here. My particular case is  
20 that once the civil action in Nevada was filed in July 2003,  
21 from that point forward, according to the holding in *Fields*,  
22 was that all that information could have been subject to a  
23 protective order, number one, but to be subject to a protective  
24 order you have to know that you have to protect something which  
25 would indicate the government had an obligation to inform the

1 Court as well as the civil litigants in the case in Nevada.

2 Now, again, following Fields, the investigative  
3 portion of that file was also held by the civil authorities  
4 until such time as the overall civil action was concluded,  
5 which would include my deposition or anything that the SEC also  
6 obtained in 2002.

7 So, if you apply Fields to this case, none of the  
8 SEC's civil files could be transmitted to the criminal  
9 authorities until some type of settlement, judgment or  
10 something in the civil action took place

11 THE COURT: But Fields, among other things, involved a  
12 referral by the SEC, didn't it?

13 MR. WARE: After the conclusion of the civil case,  
14 your Honor. I'll show you exactly where it says it here. It  
15 says on page 6 in my printing: These contacts with Assistant  
16 United States Attorney Sorkin continued to October and  
17 November. During this period Tucker and Perlmutter urged the  
18 United States Attorney's office to investigate the TDA matter,  
19 but they made it clear they wanted to conclude a settlement in  
20 the civil action before making a criminal reference.

21 That's very important because the Federal Rules of  
22 Civil Procedure govern that entire space, your Honor. So once  
23 the Federal Rules of Civil Procedure attach, which is, of  
24 course, at the initiation of the civil action, then all that  
25 information that's been transmitted to the SEC is subject to a

1 protective order, and it's also subject to notice by the  
2 criminal authorities to the Court and the civil litigants that  
3 a pending imminent criminal action is contemplated.

4 THE COURT: But in this case wasn't there an entirely  
5 independent referral by Judge Sand to the U.S. attorney for the  
6 Southern District?

7 MR. WARE: Independent as far as the actual -- I guess  
8 it came in from Judge Sand. I don't know if that's the only  
9 inference they have. The government never addressed that issue  
10 in its papers, if that was the only instance of any type of  
11 referral activity. But even if it was, they are still governed  
12 by the Federal Rules of Civil Procedure, your Honor, whether or  
13 not it came from Judge Sand or whether or not it came from the  
14 SEC itself. I don't think the subject of the source of the  
15 referral governs whether or not the information obtained during  
16 the investigative phase is subject to the Federal Rules of  
17 Civil Procedure.

18 Regardless of where the referral comes from, the  
19 Federal Rules of Civil Procedure attach at that point as long  
20 as the civil action is ongoing until there's a concrete  
21 conclusion, then the government is obligated to a notice.  
22 Otherwise, due process then is totally on notice, your Honor.  
23 If you don't have any notice, you can't have any due process.  
24 You have to have notice to know you need a protective order.  
25 You have to have notice to know that you need to remain silent

1 from something. So, without notice, you can't assert your  
2 right. So I think it would be virtually impossible to say or  
3 to assert that the Federal Rules of Civil Procedure do not  
4 attach regardless of where the referral comes from. That  
5 wouldn't be logical.

6 THE COURT: Let me return to the question I posed  
7 earlier, specifically what documents or information is it that  
8 you're seeking to suppress?

9 MR. WARE: Your Honor, I don't have a laundry list of  
10 everything I was given. I would seek to suppress according to  
11 Fields every document the SEC obtained and gave to the U.S.  
12 Attorney's office. Now, again, I would ask the Court to have  
13 the U.S. Attorney's office delineate every document they  
14 received from the SEC from the beginning to the end. I don't  
15 know what that is.

16 THE COURT: Hasn't the U.S. Attorney's office already  
17 advised you that they've produced to you in discovery every  
18 document that they received from the SEC?

19 MR. WARE: No, sir, they have not. I specifically  
20 asked Mr. Southwell if he would give a log of all documents,  
21 exhibits, e-mails, summaries of statements of SEC action, but  
22 he adamantly refused. If need be, I can supply the Court with  
23 a copy of that letter to Mr. Southwell, but, no, sir, that had  
24 never taken place.

25 Also, your Honor, a very important issue is exactly

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1 what date Agent Makol contacted Mr. Norris. The government has  
2 never supplied one affidavit in any of its files detailing  
3 exactly what date. Was it before July 2003? Or was it after  
4 July 2003? If it was before July 2003, again, the same  
5 procedures take place at that time, which, again, the  
6 government has been silent on that issue, your Honor.

7 THE COURT: The government says in its memorandum of  
8 law in opposition to your motion at page 3, the bottom of the  
9 first full paragraph, and I quote: "In the course of  
10 communications with the SEC, the government obtained the  
11 depositions taken by the SEC as well as the documents obtained  
12 by the SEC in the course of that action and investigation (all  
13 of which have been turned over to the defense in discovery in  
14 this matter)."

15 MR. WARE: One second, your Honor. Excuse me.

16 THE COURT: It's on Page 3.

17 MR. WARE: Okay.

18 THE COURT: The bottom of the first full paragraph.  
19 In light of that, how can you assert to me that the government  
20 has not turned over the documents that it received from the  
21 SEC?

22 MR. WARE: Let me make sure I'm reading what you said.  
23 You said the SEC approved -- could you point that out to me?

24 THE COURT: I'm reading the next sentence. "In the  
25 course of communications with the SEC, the government obtained



1 the depositions taken by the SEC as well as the documents  
2 obtained by the SEC in the course of that action and  
3 investigation (all of which have been turned over to the  
4 defense in discovery in this matter)."

5 MR. WARE: Your Honor, I can state right now that  
6 e-mails, SEC summaries, I don't have them. If you summon Mr.  
7 Bachner, then he can make that statement to the Court. They  
8 weren't in the documents that Mr. Bachner sent to my office,  
9 any SEC summaries, any SEC reviews, any SEC matters. That was  
10 not sent to me. I don't have it. If Mr. Southwell can say he  
11 did that, then -- again, that's why I asked for a log earlier  
12 in this action, your Honor, of every document Mr. Southwell  
13 said he sent to the defense so that we wouldn't have this  
14 issue. He adamantly refused to supply the log of -- I asked  
15 for telephone calls. I asked for e-mail correspondence. I  
16 asked for SEC summaries. I asked for any FBI transmissions to  
17 the SEC, any SEC transmissions to the FBI. Mr. Southwell  
18 adamantly refused to supply that information to me, personally  
19 to me.

20 So if he's done it, he can say he's done it, but I  
21 don't have it if he's done it. I know there is no log that  
22 I've been supplied with. Not only what he actually received  
23 from the SEC, he never would supply a log for that either, your  
24 Honor. I asked him specifically for that via letter, and he  
25 adamantly refused to do it. If you give me one moment, your

1 Honor, I will give you his letter replying to that.

2 THE COURT: No. Anything further that you want to  
3 argue to me in connection with this application?

4 MR. WARE: Well, yes, sir, your Honor. Again, I just  
5 want to address some of Mr. Southwell's authority in his  
6 opposition. Again, he cites the case of Fields, which Fields I  
7 think is directly on point of what I'm arguing for here that  
8 particular case was a Second Circuit case --

9 THE COURT: I thought that Fields in part commended  
10 interagency cooperation.

11 MR. WARE: They did, absolutely. But there's a  
12 procedure that you must follow, your Honor. The procedure is  
13 governed by the Federal Rules of Civil Procedure, and they're  
14 governed by the Federal Rules of Criminal Procedure. You can't  
15 have interagencies violating the civil rules. The Court said  
16 -- excuse me one second. But they make it clear that they  
17 wanted to conclude, which means in, a settlement in a civil  
18 action before making a criminal reference. Why would that be,  
19 your Honor if they could just send it over any time? They  
20 wanted to have a conclusion because, number one, the Federal  
21 Rules of Civil Procedure gives defendants certain  
22 constitutional rights, constitutional rights not to incriminate  
23 yourself.

24 Let me give you an illustration, your Honor. In a  
25 civil action, a defendant is being investigated criminally as

1 well as civilly. A civil complaint is filed. Now, the  
2 defendant has two choices: He can answer the complaint and  
3 expose his defenses to the criminal authorities because it's  
4 based on the same conduct or he can seek a stay in the civil  
5 matter so that the criminal authorities can conclude their  
6 matters. Otherwise there would be a fundamental due process  
7 issue. Again, if the deposition of that same civil litigant  
8 was trying to -- was attempting to be deposed, he has two  
9 options. He can give a deposition, which, of course, could be  
10 used in a civil and a criminal process, or he can seek a stay.  
11 But, again, you have to know you need to seek a stay from  
12 something, which means due process --

13 THE COURT: Isn't there a third alternative? He can  
14 give his deposition, and he can assert the Fifth Amendment in  
15 answer to certain questions.

16 MR. WARE: He can do that.

17 THE COURT: And if he does that in a civil proceeding,  
18 the finder of fact is entitled to draw an inference.

19 MR. WARE: A negative inference.

20 THE COURT: A negative inference from the assertion of  
21 the Fifth Amendment. Right?

22 MR. WARE: Absolutely, but there is a Supreme Court  
23 case directly on point that says why should a defendant be  
24 punished by doing what the law allows. I'll cite that for you,  
25 your Honor. It's a case of -- it's a Supreme Court case United

1 States v. Goodwin, 457 U.S. 368 (1982). At page 372 the Court  
2 said, to punish a person because he has done what the law  
3 plainly allows him to do is a due process violation of the most  
4 basic sort. The Court went on to say at page 373: As a  
5 result, in certain cases in which actions detrimental to the  
6 defendant have been taken after the exercise of a legal right  
7 to remain silent, the Court has found it necessary to assume an  
8 improper vindictive motive. So, your Honor that, governs that.

9 THE COURT: But that's where a civil investigation and  
10 a criminal investigation are concurrent. Isn't that true?

11 MR. WARE: Not necessarily true, your Honor. Well, I  
12 mean, why would it only apply in that particular --

13 THE COURT: Why does it apply here where the civil  
14 investigation was under way long before any thought of a  
15 criminal investigation even entered the mind of the U.S.  
16 attorney for the Southern District?

17 MR. WARE: Your Honor, one portion of it. Your Honor,  
18 I think we have to bifurcate the SEC action. There was an  
19 investigative phase which concluded with the Wells notice.  
20 Subsequent to the Wells notice, there is an enforcement  
21 proceeding initiated by the filing of a civil complaint; two  
22 distinctive phases of civil actions by the SEC.

23 Once the civil action is filed, the Federal Rules of  
24 Civil Procedure kick in. They don't apply prior to the filing  
25 of the civil complaint. So, therefore, you have two

1 distinctive and bifurcated SEC actions.

2 THE COURT: But even the filing of the civil action  
3 was before the referral from Judge Sand by at least six months.  
4 Right?

5 MR. WARE: Well, that's what the government papers  
6 say, but, again, we do not know when Agent Makol contacted  
7 Mr. Norris. We don't know that date. Nor do we know if  
8 Mr. Norris contacted anyone either, your Honor. We don't know  
9 that information. The government has not presented any  
10 affidavits to any of that information. Did Mr. Norris contact  
11 Mr. Southwell's office? We don't know that. That's an issue,  
12 because if he did, of course, his investigation could have been  
13 governed by the communications with Mr. Southwell's office.

14 Now, what happened in Mr. Southwell's office going  
15 out, according to Mr. Southwell, the referral came into his  
16 office, December 3, 2003 from Judge Sand. In. Now, what went  
17 out? He's silent on that point, your Honor. I think that's an  
18 issue that would have to be determined. Exactly what was the  
19 communication between his office and the SEC and when did that  
20 occur?

21 But even when it occurred, again, let's step back and  
22 apply Fields to it. Fields says that as long as any type of  
23 SEC civil action is ongoing, via be it the investigative phase  
24 or the enforcement phase, the SEC in that particular case made  
25 it clear they wanted to conclude a settlement because at that

1 point the Federal Rules of Civil Procedure expire, so to speak.  
2 They wanted to make sure there was no commingling. They didn't  
3 turn over any of the file until -- excuse me one second, your  
4 Honor -- one issue that was patently different in that case,  
5 the defendants waived their Fifth Amendment rights in Fields  
6 there. There was no waiver in the civil litigation because the  
7 defendants in Fields were aware of pending or possible criminal  
8 actions. So, again, due process -- notice is the foundation of  
9 due process. There was no notice given to any of the civil  
10 litigants in the civil action in Nevada. I can state  
11 unequivocal to that.

12 THE COURT: All right. Let me hear from your  
13 adversary. All right? Thank you, Mr. Ware.

14 MR. SOUTHWELL: Your Honor, briefly in --

15 THE COURT: Why don't you take the podium.

16 MR. SOUTHWELL: Yes. Thank you, your Honor.

17 I think that, your Honor, we have laid out the facts  
18 in our response and all the prior papers here. Let me just  
19 respond to a few things that Mr. Ware has asserted, and I think  
20 at core there is no legal support for what Mr. Ware seeks here.  
21 Moreover, there's no factual support for that. There is no  
22 authority for this proposition that there is a duty to inform  
23 people that they're under criminal investigation. The law  
24 simply is not that. None of the cases cited by Mr. Ware say  
25 that. The statements he refers to from the Fields case are

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1 Trading was suspended for two weeks beginning April 22, 2002.  
2 When it resumed two weeks later, the stocks traded at a much  
3 lower price. It had tanked.

4 What we did in our loss analysis for restitution and  
5 loss purposes was look at the average price of INZS stock for  
6 the one-month period after the market tanked. So not just the  
7 particular one day when maybe it tanked and then went back up a  
8 little. We took an average so that we didn't just put on  
9 Mr. Ware that particular one-day period. We used that  
10 one-month average as a credit against any losses that the  
11 victims actually suffered. So we tried to credit them for a  
12 residual value in the stock.

13 With SVSY it is a little more complicated. The market  
14 was never informed of Mr. Ware's fraud. They may not know  
15 about it to this day other than our attempts to give out victim  
16 letters. So what we did with SVSY is analyse what did people  
17 buy when it was inflated and then we took the average price  
18 from an eleven-month period. So that is approximately 11  
19 months. That is the average price from when Mr. Ware's scheme  
20 stopped until the company changed names into 50 to 1 stock  
21 split. So we thought that was a natural period to break and a  
22 natural period to analyze. We determined what the average  
23 stock price was for that whole period.

24 So once the company was no longer being pumped up with  
25 miss information, what did the stock trade at? And we credited

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1 class of investors that but for the inflated price or press  
2 releases they wouldn't have bought the shares.

3 Secondly, of course, loss causation, which *Dura I*  
4 think now makes very clear, which is that plaintiff in a  
5 securities fraud action may not establish essential element of  
6 the claim loss causation merely by alleging and proving that at  
7 the time he approaches the stock its price had been  
8 artificially inflated due to false statements by the defendant.

9 The government in its most recent brief that I  
10 commented on seemed to be making that very argument. They  
11 wrote at page 11, "The government submits that all purchases of  
12 INZS and SVSY stock during the time period that Ware  
13 perpetrated his fraud are victims entitled to restitution  
14 because they purchased the stock while the market was  
15 artificially manipulated by Ware." That is just not enough.

16 Your Honor, certainly with respect to SVSY where the  
17 government has stated today there was no revelation of the  
18 truth, there was no event that they can point to that caused in  
19 their view the loss, there certainly is no basis to say that  
20 the government has proved that Mr. Ware proximately caused the  
21 loss, which is what the Court would have to find.

22 Finally, your Honor, this will be the last thing I  
23 say, in *Dura Pharmaceuticals* they specifically address the  
24 question of whether or not a plaintiff can prove loss and  
25 recover in a securities fraud action when he buys at one price



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1 point.

2 THE COURT: We are just focusing on the presentence  
3 report.

4 MR. WARE: Yes, sir.

5 Those are my objections, your Honor.

6 THE COURT: Now, do you wish to be heard with respect  
7 to the sentencing submissions?

8 MR. WARE: Yes, sir.

9 THE COURT: I will hear you.

10 MR. WARE: Mr. Feldman submitted a sentencing  
11 submission to the government, your Honor, dated August 14,  
12 2007.

13 THE COURT: Mr. Ware, we are going to take a short  
14 break for the benefit of the Court and the court reporter. We  
15 will reconvene in 10 minutes.

16 (Recess)

17 THE COURT: Before Mr. Ware proceeds with his  
18 argument, I would like to make an inquiry of the government.

19 \* Mr. Ware has requested a Fatico hearing. Let me put  
20 it to the government this way: Does the government want to  
21 proceed with sentencing and put aside restitution, or does the  
22 government want to press for restitution? If the government  
23 wants to press for restitution then I think we should have a  
24 Fatico hearing concerning among other things the efficiency of  
25 the market. Because at the end of the day, Mr. Feldman, I

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1 fraud-on-the-market analysis to prove causation. We have that  
2 causation. In addition, as to those particular 250 victims who  
3 we haven't interviewed each one of them, they are in fact  
4 victims and we explained that because of this concept that the  
5 causation to the degree it applies can be substituted by the  
6 idea that Mr. Ware had generally caused this market to be  
7 inflated.

8 If what you are looking for is that this wasn't a  
9 thinly traded market, that kind of evidence that Mr. Ware has  
10 just pointed out today, we are not going to find it.

11 THE COURT: If the government is advancing a fraud on  
12 the market theory, then the government should be able to prove  
13 the elements of a fraud on the market theory. That is what a  
14 hearing would be about.

15 MR. FELDMAN: Your Honor, if that is your holding and  
16 your Honor's version is that a fraud-on-the-market theory  
17 means, among other things, that these were not thinly traded  
18 stocks, I know we are not going to be able to meet that burden.  
19 These were thinly traded stocks. That is why Mr. Ware's press  
20 releases were able to have the effect that they did.

21 So if that is your Honor's holding, I respectfully  
22 object to it. I know I cannot meet it and we should move  
23 forward with sentencing.

24 THE COURT: Have you looked at Mr. Ware's Fifth  
25 Circuit case?